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SPECIFIC PERFORMANCE OF CONTRACTS FOR THE SALE OF PERSONALTY AT THE INSTANCE OF THE SELLER.—As a general rule courts of equity will refuse specific performance of contracts for the sale of personal property.[1] This is not the result of any distinction between the principles applying to contracts for the sale of real property and those concerning personal property, but because in the case of the latter the remedy at law is usually adequate and satisfactory.[2] And specific performance will be granted less readily when the remedy is sought by the seller than when it is sought by the buyer, since in seeking specific performance the seller seeks to recover money, and he can get that in an action at law.[3] It has

[1] Jones *v.* Newhall, 115 Mass. 244, 15 Am. Rep. 97; Hissam *v.* Parrish, 41 W. Va. 686, 56 Am. St. Rep. 892, 4 Pom. Eq. Jur. (3d ed.), § 1402.

[2] Rothholtz *v.* Schwartz, 46 N. J. Eq. 477, 19 Atl. 312, 19 Am. St. Rep. 409. "Thus a Court of Equity decrees specific performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a Court of Equity will not, generally, decree specific performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for; inasmuch as, with the damages, he may purchase the same quantity of the like stock or goods." Adderley *v.* Dixon, 2 L. J. Ch. (O. S.) 103, 1 Sim. & Stu. 608, 57 Eng. Reprint 239.

[3] Cole *v.* Cole Realty Co., 169 Mich. 347, 135 N. W. 329.

been suggested that legal damages is an inadequate remedy, since the measure of damages is the difference between the selling price and the market value, while the seller ought to have what he contracted for—the whole selling price;[4] but, if this were true, then damages would be an inadequate remedy in every instance of breach of contract.[5]

But, aside from the fact that he usually has an adequate remedy at law, there is nothing peculiar about the position of the seller of personalty, and the same principles apply to his bill for specific performance as to any other. If he can show that in fact he has no adequate legal remedy, specific performance will be granted him as readily as any other complainant.[6] And unless he can show lack of adequate remedy at law, he is not entitled to specific performance, since that is the only ground upon which equity has jurisdiction to grant specific performance in any case.[7] The commonest case in which the seller is without adequate legal remedy is where the property in controversy has no ascertainable market value. Since the market value is the basis of the measure of damages, the court of law has no means of ascertaining the proper amount of damages, and equity will decree specific performance.[8] This is exemplified in the recent case of *U. S. Fire Apparatus Co.* v. *Baker Machine Co.* (Del. Ch.), 95 Atl. 294, where specific performance was granted in favor of the seller of certain corporate stock having no market value. Other cases in which equity has granted specific performance at the suit of the seller of personalty because his remedy at law was inadequate, are found where several suits at law would have been necessary to adjust the controversy;[9] where the sale was so far consummated that the goods had already been delivered into the possession of an insolvent buyer having no other property, who refused to give certain securities which he had promised, and who might have deprived the seller of all means of satisfying a legal judgment by removing the goods in controversy beyond the jurisdiction;[10] and in England where the seller of corporate stock sought to have title in the stock transferred to the buyer and the transfer recorded on the books of the corporation in order that he might be indemnified against liabilities attaching to the stock in the shape of calls, etc.[11]

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[4] See POM. SPEC. PERF. (2d ed.), § 6, note 5.
[5] POM. EQ. REM. (3d ed.), § 747.
[6] Rothholtz *v.* Schwartz, *supra.*
[7] 4 POM. EQ. JUR. (3d ed.), § 1401; Eckstein *v.* Downing, 64 N. H. 248, 10 Am. St. Rep. 404; Hissam *v.* Parrish, 41 W. Va. 686, 56 Am. St. Rep. 892.
[8] First Nat'l Bank *v.* Corp. Securities Co. (Minn.), 150 N. W. 1084. See also Cole *v.* Cole Realty Co., *supra;* Morgan *v.* Bartlett (W. Va.). 83 S. E. 1031; Austin *v.* Gillaspie, 54 N. C. 261; Hills *v.* McMunn, 232 Ill. 488, 83 N. E. 963.
[9] Bumgardner *v.* Leavitt, 35 W. Va. 194, 13 S. E. 67, 70, 12 L. R. A. 776.
[10] Rothholtz *v.* Schwartz, *supra.*
[11] See Coles *v.* Bristowe, L. R. 6 Eq. 149.

In some cases it has been said that where the buyer is entitled to specific performance the same remedy will be granted in favor of the seller, "in order that there might be mutuality of remedy." [12] The line of reasoning in the cases that have stated this theory seems to be as follows: As a general rule specific performance of a contract will be granted only when there exists a mutuality of remedy between the plaintiff and defendant. In the case in hand the buyer would be entitled to specific performance. Therefore, since there must be mutuality of remedy, specific performance will be decreed in favor of the vendor. This line of reasoning seems false and absurd on its face. Reduced to its essence, it is, that since the vendee is entitled to specific performance the remedy must be given the vendor also, in order that mutuality of remedy, *a prerequisite to the vendee's right,* might exist. How can the vendee be entitled to specific performance under this theory in the first place, unless mutuality of remedy already exists? The whole theory of mutuality of remedy is probably the result of a confusion with the requirement of mutuality of obligation, and has been very severely criticized.[13] It would seem that the mutuality required is only that which is necessary for creating a contract enforceable on both sides in some adequate manner, but not necessarily on both sides by specific performance, and that there is a sufficient mutuality of remedy when the seller has an adequate remedy at law.[14] Of the cases in this country which apparently support the doctrine that there must be mutuality of remedy in that specific performance must be granted to the vendor because it is granted to the vendee, few really sustain it, since in almost every one of them the seller had no adequate remedy at law and specific performance could have been granted on that true ground.[15] That specific performance would have been granted at the suit of the vendee is not the reason for granting this form of relief at the instance of the vendor. The vendor's relief is based upon the inadequacy of

[12] Withy *v.* Cottle, Turn. & R. 78, 37 E. R. 1024, 1 L. J. Ch. (O. S.) 5, 117, 1 Sim. & Stu. 174, 57 Eng. Reprint 70; Adderley *v.* Dixon, *supra;* Cole *v.* Cole Realty Co., *supra;* Bumgardner *v.* Leavitt, *supra;* Morgan *v.* Bartlett, *supra.*

[13] Thus Pomeroy says, "I think it very clear, that the rule was applied with much more strictness and severity in the older than in the later decisions, indeed, the rule, so far as it relates to the mutuality of the remedy alone, is evidently based upon no principles of abstract right and justice, but, at most, upon notions of expediency; and the arguments in its support are often mere repetitions of time-honored verbal formulas, which, when closely analyzed, are found to have little or no real force and meaning." POM. SPEC. PERF. (2 ed.), § 169, note 1.

[14] Eckstein *v.* Downing, *supra.*

[15] Thus in Cole *v.* Cole Realty Co., *supra;* Austin *v.* Gillespie, *supra;* and Morgan *v.* Bartlett, *supra,* all of which stated the rule as at least partial grounds for their decision, the contracts in question were for the sale of corporate stock having no ascertainable market value; and in Bumgardner *v.* Leavitt, *supra,* which is one of the cases most frequently cited to sustain the proposition, no less than three actions at law would have been necessary to settle the matter in controversy.

his legal remedy, as is that of the vendee. The growth of this erroneous doctrine has probably been greatly facilitated by the fact that those facts which produce a lack of adequate legal remedy for the vendee usually (but not necessarily) produce the same status for the vendor. Moreover, the most carefully considered cases in this country expressly repudiate the proposition.[16] It has been suggested that these decisions are the result of statutes restricting the jurisdiction of courts of equity to grant specific performance to cases in which there was no adequate legal remedy;[17] but it would seem that such statutes are merely declaratory of the rule as it existed in this country prior to the statutes.[18] It is true that in England the rule that where one party is entitled to specific performance that remedy will be granted in favor of the other, "since the remedy in equity must be mutual," is apparently so well established that as early as 1822 the courts would not deign to discuss it or to cite authorities to support it.[19] It was probably arbitrarily established in the early period of the history of the equity jurisprudence of that country, and the courts of chancery having once obtained jurisdiction on that ground have retained it.[20] But it is believed that this rule is not founded upon any reasons of abstract right and justice and cannot be supported on principle, and, further, that it has never been adopted by our courts and has no place in the equity jurisprudence of this country.

APPLICATION OF WEBB-KENYON LAW TO INTERSTATE SHIPMENTS OF INTOXICATING LIQUORS.—Laws for the prohibition of the sale of intoxicating liquors have been enacted in most of the states, some in the form of state wide prohibition and others in the form of local option laws. The use and sale of intoxicating liquors being contrary to morals and detrimental to the interest of society, the power of the states to subject them to the exercise of the police power is unquestionable. But in the exercise of such power the states could only regulate the intrastate traffic and not the interstate traffic thereof, for to do so would be in violation of the commerce clause of the Federal Constitution.[1]

Under the laws of interstate commerce, the police power of a state cannot affect such class of shipments until the original packages have been broken.[2] To relieve this situation Congress passed in 1890 a law known as the Wilson Act.[3] This act in its wording subjected interstate shipments of intoxicating liquors to the police power of the states immediately upon the arrival in such state, but the Supreme Court has construed this to mean that they are not sub-

[16] Jones *v.* Newhall, *supra;* Eckstein *v.* Downing, *supra.*
[17] POM. SPEC. PERF. (2 ed.), § 6, note 1.
[18] See authorities cited in note 7, *supra.*
[19] See Withy *v.* Cottle, *supra;* Adderley *v.* Dixon, *supra.*
[20] See Jones *v.* Newhall, *supra.*
[1] U. S. Const. Art. 1, § 8.
[2] Leisy *v.* Hardin, 135 U. S. 100.
[3] 26 Stat. at L. 313, chap. 728, Comp. Stat. (1913), § 3177.